SUNWAY PMI-PILE CONSTRUCTION SDN BHD

v.

PEMBENAAN CHAN & CHUA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
T SELVENTHIRANATHAN J
[CIVIL SUIT NO: D7-22-2952-1999]
28 DECEMBER 2001

CIVIL PROCEDURE: *Pre-trial - Case management - Filing of documents - Non-compliance with court's directions - Defendant showing total disregard for directions - Whether defence and counterclaim to be dismissed - Whether judgment to be entered for plaintiff - Rules of High Court 1980 O. 34 rr. 3(1), 3(2), 7*

The court in this case was undertaking a case management exercise pursuant to O. 34 Rules of High Court 1980 ('RHC') and had issued various directions for the parties to file the necessary documents. Notwithstanding that several dates had been fixed by the court for pre-trial conferences, thereby giving the defendant ample time to comply, the defendant did not comply with the directions, and had also ignored the plaintiff's repeated requests for cooperation in preparing the bundle of documents. The plaintiff argued that the defendant was guilty of unnecessary delay, and in the circumstances urged the court to invoke O. 34 r. 7 of RHC and dismiss the defendant's defence and counterclaim.

Held:

[1] Order 34 RHC allows the court to take a proactive role in setting down timeframes and giving directions as to the preparation of each party's case for the purpose of the trial, while at the same time enabling the court to impose sanctions for non-compliance with the directions. (p 71 c-d)

[2] The many letters of the plaintiff's solicitors, which went unanswered, cumulatively pointed to a totally nonchalant attitude on the part of the solicitors for the defendant in their approach to the orders and directions given by the court at the pre-trial conferences. The fault for non-compliance clearly lay with the solicitors for the defendant, whose utterly recalcitrant conduct had hindered the plaintiff from proceeding with the action. In the circumstances, this was a proper case for the court to exercise its powers

under O. 34 r. 7 RHC and order that the defence and counterclaim be dismissed and that judgment be entered for the plaintiff as per the statement of claim. (p 76 e-h)

[Order accordingly.]

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 13, O. 34 rr. 3(1), (2), 4(1), 7

For the plaintiff - Azhar Nur Abdul Manaf; M/s Shui-Tai
For the defendant - Rajinder Singh; M/s Chan Kim Goh & Co

Reported by WA Sharif

JUDGMENT

T Selventhiranathan J:

On 2 August 2001, when encls. (11) and (13) (the notices in Form 63 of Appendix A to the Rules of the High Court 1980 ("the Rules") to attend the pre-trial conference of this case filed by the plaintiff and the defendant pertaining to the claim and counterclaim respectively) came on for continued hearing, I made the following order after hearing the learned counsel appearing for the parties:

> Court: This is a proper case for the court to exercise its powers under Order 34, rule 7 of the Rules of the High Court 1980 owing to clear documentary proof in the form of letters (and admission by counsel for the defendant of failure to respond thereto) of the uncooperative attitude of the defendant which resulted in its failure to comply with the court's directions of the 1st March 2001, which directions were repeated by the senior assistant registrar on the 6th June 2001.
>
> I therefore accordingly order that the defence and counterclaim be dismissed and that judgment be entered for the plaintiff as per its claim with costs as I am of the view that such an order against the defendant, which has been the defaulting party here, will meet the ends of justice.
>
> The above is my order and I reserve the right to supply my grounds of judgment in the event of an appeal.

Further thereto, I set out hereunder the reasons for making that order as the defendant has appealed to the Court of Appeal against my decision. In this judgment, any reference to an order, rule or form by itself shall mean that order of, or that rule in an order of, or that form in the relevant appendix to, the rules respectively.

For the purpose of completeness, I also directed that the note of the proceedings in relation to encls. (11) and (13) before the senior assistant registrar ("the registrar") on 6 June 2001 during the court vacation be included in the notes of proceedings provided for the purposes of the appeal.

On 1 March 2001, when the parties appeared before me for a pre-trial conference in respect of encls. (11) and (13) and after conferring with them, I directed that they file the following documents by 22 May 2001:

(a) the bundle of pleadings;

(b) a common bundle or bundles of documents to be divided into those agreed upon and those disputed, as to maker or contents or both, as the case may be;

(c) facts upon which the parties were agreed;

(d) the issues;

(e) the facts to be proved by each party in relation to the issues.

The two enclosures were then set down for continued hearing and further directions on 6 June 2001.

However, that date fell within the court vacation (the dates of which were only made known subsequent to 1 March 2001) and, in accordance with practice, encls. (11) and (13) were mentioned before the registrar on that date. Upon the parties' application, he gave an extension of time until 22 June 2001 for the parties to comply with my directions of 1 March 2001, and set down the enclosures for continued hearing on 2 August 2001.

On the latter date, the counsel for the plaintiff at first sought a further extension of two months for the parties to comply with the court's directions.

However, when the court questioned him as to the reasons for non-compliance with its directions, he produced correspondence which clearly showed, apart from a letter dated 5 June 2001 wherein the defendant's solicitors thanked the plaintiff's solicitors for agreeing to mention the case on their behalf on 6 June 2001, that the defendant's solicitors took a could-not-care-less attitude to repeated requests contained in a series of letters beginning from 12 April to 11 July 2001 from the plaintiff's solicitors seeking their agreement and cooperation in preparing the bundle of documents, statement of agreed facts and issues for the trial of this action.

In this regard, I reproduce hereunder all the material correspondence (without corrections as to grammar, spelling and punctuation) between the solicitors for

the parties in chronological sequence for an appreciation of the totality of the circumstances which led me to make the order that I did:

Plaintiff's letter dated 12 April 2001

SHUI-TAI
ADVOCATES & SOLICITORS
PEGUAMBELA & PEGUAMCARA

Your Ref: FL/SPCSB/PCCSB/L/99/L209 Our Ref: ST/SW/55/99 Date:12th April 2001

M/s Chan Kim Goh & Company
Advocates & Solicitors
42-2, Jalan 5/101C
Off Jalan Kaskas
5th Mile Jalan Cheras
56100 Kuala Lumpur

BY COURIER
FAX 91325008

Dear Sirs

Re: Kuala Lumpur High Court Civil Suit No D7-22-2952-99
Sunway PMI-Pile Construction Sdn Bhd vs Pembenaan Chan & Chua Sdn Bhd

We refer to the above matter which is fixed for mention on 22/5/2001.

As instructed by the court. Kindly let us know whether your goodselves are agreeable to the following documents to be included in Part I of the Bundle of Documents (Agreed Bundle of Documents).

a) Letter of Award 16/08/1995

b) Letter from Plaintiff 01/09/1995

c) Letter from Plaintiff 23/03/1996

d) Final Claim from Plaintiff 19/07/1996

e) Letter from Plaintiff together with the Statement of Account 31/10/1997

f) Letter from Plaintiff together with Statement of Final Account 26/10/1998

g) Letter of Demand from Plaintiffs Solicitors with the proof of Posting 30/09/1999

h) Letter from Plaintiff 12/04/1996
(as enclose herewith for your easy reference)

Kindly let us know whether your goodselves would like to include any other documents in the said bundle.

Thank you. Yours sincerely

Sgd

cc client - Attn: Mr Eric Tan
fa/sgw6/sw55 [FAX (7358783)/MAIL]

Plaintiff's letter dated 11 May 2001

SHUI-TAI
ADVOCATES & SOLICITORS
PEGUAMBELA & PEGUAMCARA

Your Ref: FL/SPCSB/PCCSB/L/99/L209 Our Ref: ST/SW/55/99 Date:11th May 2001

M/s Chan Kim Goh & Company
Advocates & Solicitors URGENT
42-2, Jalan 5/101C Fax(2216213)/Mail
Off Jalan Kaskas
5th Mile Jalan Cheras
56100 Kuala Lumpur

Dear Sirs

Re: Kuala Lumpur High Court Civil Suit No D7-22-2952-99
Sunway PMI-Pile Construction Sdn Bhd vs
Pembenaan Chan & Chua Sdn Bhd

Our letter dated 12/4/2001 refers.

Kindly let us have your reply immediately in view this matter is now fixed for Full-Trial on 6/6/2001.

Thank you.

Yours sincerely Sgd

cc client - Attn: Mr Eric Tan [Fax (7358783)/MAIL]
fa/sgw6/sw55

Defendant's letter dated 5 June 2001

Chan Kim Goh & Company

Peguambela & Peguamcara
Advocates & Solicitors

Your Ref: ST/SW/55/99
Our Ref: FL/SPCSB/PCCSB/L/99/L209

a 5th June 2001

Messrs Shui Tai
Advocates & Solicitors
Entrance 2, Suite 1308, 13th Floor
Block A, Damansara Intan
b No 1, Jalan SS20/27
47400 Petaling Jaya
Selangor Darul Ehsan By Fax: 77298503/Post

Attn: Encik Azahar

c Dear Sirs

Re: Kuala Lumpur High Court
Writ Summons No D7-22-2952-1999
Sunway PMI-Pile Construction Sdn Bhd - Plaintiff
Pembenaan Chan & Chua Sdn Bhd - Defendant

d We refer to the above matter which is fixed for mention on 6th June 2001 and to the subsequent teleconversation between your Encik Azahar and our Mr Freddy Lim today.

We write to confirm your kind agreement that you have graciously agreed to mention on our behalf on the said date.

e

Please inform us of the next date which is to be fixed for case management.

Yours faithfully

Sgd

f /FL/JF

cc client - Pembenaan Chan & Chua Sdn Bhd

(Disk 209: PL-SOL-4)

g Plaintiff's letter dated 19 June 2001

SHUI-TAI
ADVOCATES & SOLICITORS
PEGUAMBELA & PEGUAMCARA

h Your Ref: FL/SPCSB/PCCSB/L/99/L209 Our Ref: ST/SW/55/99 Date: 19th June 2001

M/s Chan Kim Goh & Company
Advocates & Solicitors URGENT
42-2, Jalan 5/101C BY FAX(91325008)/POST
Off Jalan Kaskas
i 5th Mile Jalan Cheras
56100 Kuala Lumpur

Dear Sirs

Re: Kuala Lumpur High Court Civil Suit No D7-22-2952-99
Sunway PMI-Pile Construction Sdn Bhd vs
Pembenaan Chan & Chua Sdn Bhd

We refer to your letter dated 5.6.2001.

Kindly be informed that the Court has fixed 2.8.2001 for further hearing of Enclosure 11 and 13 (Case Management). Also, the Court has noted that both parties have failed to comply with the following:

(i) To file Bundle of Pleadings;

(ii) To file Bundle of Documents (Agreed/Non-Agreed);

(iii) To file Statement of Agreed Facts; and

(iv) To file Statement of Issues to be tried.

As the Court has directed that the abovesaid be complied with by 22-6-2001, kindly confirm/advising/forward us the following immediately:

(a) To reply to our letter dated 12.4.2001 with regards to item (ii) above;

(b) To confirm your agreement to our Statement of Agreed Facts (a copy of which is enclosed herewith);

(c) To let us know what are the issues you wish to be tried.

Thank you.

Yours faithfully

Sgd

cc: Client (Kind Attn: Mr Eric Tan) (By Fax (5635783)/Post)

t/lets/sun-pmi-let-chan Kindly arrange a meeting for your Project Manager/ Officer to meet our Mr Desmond to discuss this matter.

Plaintiff's letter dated 26 June 2001

SHUI-TAI
ADVOCATES & SOLICITORS
PEGUAMBELA & PEGUAMCARA

Your Ref: FL/SPCSB/PCCSB/L/99/L209 Our Ref: ST/SW/55/99 Date: 26th June 2001

M/s Chan Kim Goh & Company
Advocates & Solicitors
42-2, Jalan 5/101C

URGENT
FAX/POST

Off Jalan Kaskas FAX NO 91325008
5th Mile Jalan Cheras
56100 Kuala Lumpur

Dear Sirs

Re: Kuala Lumpur High Court Civil Suit No D7-22-2952-99
Sunway PMI-Pile Construction Sdn Bhd vs
Pembenaan Chan & Chua Sdn Bhd

Our letter dated 19.6.2001 refers.

Kindly let us have your reply immediately.

Thank you.

Yours faithfully

Sgd

T/letsun-pmi/instructions

Plaintiff's letter dated 11 July 2001

SHUI-TAI
ADVOCATES & SOLICITORS
PEGUAMBELA & PEGUAMCARA

Your Ref: FL/SPCSB/PCCSB/L/99/L209 Our Ref: ST/SW/55/99 Date: 11th July 2001

M/s Chan Kim Goh & Company
Advocates & Solicitors
42-2, Jalan 5/101C
Off Jalan Kaskas BY HAND
5th Mile Jalan Cheras
56100 Kuala Lumpur

Dear Sirs

Re: Kuala Lumpur High Court Civil Suit No D7-22-2952-99
Sunway PMI-Pile Construction Sdn Bhd vs
Pembenaan Chan & Chua Sdn Bhd

We refer to the above matter.

We enclose herewith a sealed copy of the Order dated 18.4.2001 by way of service upon you as the Solicitors for the Defendant abovenamed.

Meanwhile, kindly let us have your reply to our letter dated 19.6.2001. Thank you.

Yours faithfully

Sgd

cc: Client (Kind Attn: Mr Eric Tan) (By Fax (56358783)/Post)

let/sun-pmi/service

The only single letter that the solicitors for the defendant wrote in the course of the correspondence referred to above was the one dated 5 June 2001 but it in no way condescended with a reply to the plaintiffs solicitors' two earlier letters of 12 April 2001 and 11 May 2001.

The present O. 34 was introduced by amendments to the Rules *vide* PU(A) 342/2000, which came into effect on 22 September 2000. The amendments made extensive changes to the procedure to be followed before the trial of an action. They envisage the court taking a proactive role in setting down timeframes and giving directions as to the preparation of each party's case for the purposes of the trial, while enabling the court to impose sanctions for non-compliance with those directions.

For a proper appreciation of the wide discretion given to the court to impose such sanctions, I reproduce below the full text of the present O. 34:

ORDER 34
PRE-TRIAL CASE MANAGEMENT

Application. (O. 34 r. 1)

1. This Order applies to actions begun by writ and, accordingly, references in this Order to an action shall be construed as references to an action so begun.

Notice requiring parties to attend before the Judge. (O. 34 r. 2)

2.(1) The plaintiff shall, not later than 14 days after the close of pleadings under Order 18, rule 20, cause to be issued from the Registry of the Court a notice in Form 63 requiring the parties to the action to attend before the Judge.

(2) If the plaintiff fails to comply with the provisions of paragraph (1), the Judge may direct the Registry of the Court to issue a notice in Form 64 to the plaintiff to show cause why the action should not be struck out.

Powers of the Judge when parties do not appear. (O. 34 r. 3)

3.(1) If the parties to the action fail to appear before the Judge upon the return date stated in the notice in Form 63, the Judge may in his absolute discretion make any order as meets the ends of justice, including striking out the action or any defence or counterclaim, or other pleading or entering judgment against the defendant, or if there are several defendants, then against one or more of them or he

may, after recording his reasons for doing so, adjourn the proceedings to another date.

(2) Where a notice in Form 64 has been issued pursuant to the provisions of rule 2(2), the Judge may, upon the return date specified in such notice, strike out the action or make any other order or give such directions as may be specified in the order.

First pre-trial conference. (O. 34 r. 4)

4.(1) Where the parties to an action appear in person or by an advocate on the return date appearing in Form 63 (hereinafter referred to as "the first pre-trial conference"), then the Judge to whom the action has been assigned shall, after conferring with them, make such orders and give such directions as to the future conduct of the action to ensure its just, expeditious and economical disposal.

(2) Without prejudice to the generality of the provision of paragraph (1), the Judge may -

(a) direct the parties or any of them to furnish particulars of the claim or defence or other pleadings as the Judge may deem fit;

(b) order the parties or any of them to answer interrogatories on oath or affirmation;

(c) require the parties to formulate and settle, with the concurrence of the Judge, the principal issues requiring determination at the trial;

(d) order the parties or any of them to deliver their respective lists of documents that may be used at the trial of the action;

(e) direct the parties to the action to furnish to the Judge and to exchange between themselves, a bundle containing each of their respective documents;

(f) order either party to the action to furnish the report of an expert and fix the time for the delivery of such report;

(g) require each party to provide a brief summary of that party's case to the Judge in advance of the trial date;

(h) direct the parties to the action, whenever there is agreement upon all or any of the documents proposed to be relied upon by them or any of them at the trial of the action, to file and exchange a bundle of such documents;

(i) direct the parties to exchange and file a statement of agreed facts;

(j) subject to all just exceptions as to privilege, direct the parties to make any disclosure or provide any information which the Judge considers relevant to the issues in the action;

(k) limit the number of witnesses that each party to the action may call at the trial;

(l) direct the joinder of any party as a party to the action or the removal of any party who is already a party to the action;

(m) order the addition of a third party to the action and deal with all directions consequent upon such addition;

(n) fix a date for the hearing of the action;

(o) deal with all applications for amendments to the pleadings;

(p) limit the time within which any of the directions given are to be complied with.

Directions may be given in stages. (O. 34 r. 5)

5. If the Judge to whom the action has been assigned is, for any reason whatsoever, unable, at the first pre-trial conference, to give all the directions necessary for the trial of the action, he may give such directions as are necessary at that stage of the proceedings and shall fix the date of the next pre-trial conference.

Scheduling and convening of pre-trial conferences. (O. 34 r. 6)

6. The Judge may of his own motion or on application by letter by any party schedule and convene as many pre-trial conferences as he may deem necessary for the giving of directions or of such further directions he may deem necessary or for the amendment or variation of any direction already given.

Failure to comply with Judge's directions. (O. 34 r. 7)

7. If any party to an action fails to comply with any direction given by the Judge at any pre-trial conference, such order may be made against the defaulting party by the Judge as meets the ends of justice.

Order 34 r. 4(1) empowers the judge to whom the action has been assigned to "make such orders and give such directions as to the future conduct of the action to ensure its just, expeditious and economical disposal".

Having this as well as the other relevant provisions of O. 34 in mind, I gave the directions in question on 1 March 2001 adverted to earlier in this judgment, requiring compliance therewith by 22 May 2001. These directions were given after conferring with the parties, and 6 June 2001 was set down for the court to ascertain compliance with those directions. On that date, the learned counsel for the plaintiff (who also mentioned the matter on behalf of the learned counsel for the defendant) informed the registrar that the parties had not complied with my directions of 1 March 2001. In the circumstances the registrar granted the parties an extension of time of one month from 22 May 2001 until 22 June 2001 for the parties to comply with my directions and set 2 August 2001 down as the further pre-trial conference date for the continued hearing of encls. (11) and (13).

It will be seen that up to 6 June 2001 the solicitors for the defendant had not responded to the letter of 12 April 2001 from the solicitors for the plaintiff seeking the approval of the defendant's solicitors for the inclusion of the specified documents in the agreed bundle of documents. On 11 May 2001 the plaintiff's solicitors had again written to the defendant's solicitors on an urgent basis asking for an immediate reply to their letter of 12 April 2001, while stressing that the matter (ie the continued hearing of encls. (11) and (13)] was fixed for "full trial" on 6 June 2001.

Instead of taking action on these two letters from the plaintiffs solicitors, the solicitors for the defendant wrote to the plaintiff's solicitors on the eve of the continued hearing of encls. (11) and (13) on 6 June 2001 merely "to confirm your kind agreement ... to mention on our behalf on the said date".

On 19 June 2001 the plaintiff's solicitors wrote again on an urgent basis to the defendant's solicitors informing them of 2 August 2001 being fixed for the further hearing of encls. (11) and (13) and reminding them that the court had noted that both parties had failed to comply with its directions of the 1st March 2001 and requiring them, that in view of the court directing that there be such compliance by 22 June 2001, to confirm/advise upon/forward the following immediately:

(a) to reply to their letter of 12 April 2001 in relation to the documents to be agreed upon or otherwise for inclusion in the bundle of documents;

(b) to confirm the defendant's solicitors' agreement to the statement of agreed facts prepared by the plaintiffs solicitors; and

(c) to forward the issues which the defendant's solicitors wished to be tried.

This letter went unanswered as also were further urgent reminders on 26 June 2001 and 11 July 2001.

All these letters cumulatively pointed to a totally nonchalant attitude on the part of the solicitors for the defendant in their approach to the orders and directions given by the court at the pre-trial conferences held pursuant to O. 34 r. 4.

At the continued pre-trial conference on 2 August 2001, the learned counsel for the plaintiff at the outset no doubt applied for a further extension of time of two months to comply with the court's directions of 1 March 2001. However, upon clarification being sought by the court as to the reasons for non-compliance, it transpired that the fault therefor lay solely with the solicitors for the defendant and that the solicitors for the plaintiff had been unable to proceed in the face of the utter recalcitrant conduct of the solicitors for the defendant.

Against this background, the learned counsel for the plaintiff applied to the court to invoke its powers under O. 34 r. 7 and make an order that the defence and counterclaim be dismissed with costs and that judgment be entered for the plaintiff as in the statement of claim.

In response, the learned counsel for the defendant conceded not replying to the various letters written by the solicitors for the plaintiff but submitted that the defendant should only be penalised therefor by costs being awarded against it and that the defendant should not be deprived of an opportunity to prove its case through a trial of the matter as the facts relating to the claim and counterclaim were very much connected on the same subject-matter, which was as to piling works. He went on to say that upon being informed that morning by the learned counsel for the plaintiff of the failure of the solicitors for the defendant to reply to the various letters of the solicitors for the plaintiff, he had managed to work with the learned counsel for the plaintiff to narrow down and "more or less" agree on the issues to be tried, although the same was "not in prepared form".

The learned counsel for the plaintiff took objection to this response, saying that the case had dragged on for long and that, in the interests of justice, judgment should be entered for the plaintiff, particularly so when the defendant had not complied with O. 18 r. 13 in respect of its defence and counterclaim in that they were a bare denial of the plaintiff's claim without particulars being pleaded as to the defects in the piling works carried out by the plaintiff.

As to the purported settlement of the issues being reached between counsel that morning, the learned counsel for the plaintiff contended that although the same had been raised with him that morning, he had never confirmed them. He submitted further that the delay on the part of the defendant had resulted in the plaintiff suffering tremendously economically and that, although the plaintiff had done its part, the defendant had never responded, resulting in the case being dragged on unnecessarily.

To this, the final plea of the learned counsel for the defendant was that the defendant should be allowed to ventilate its defence and counterclaim and he urged the court "not to exercise its drastic powers in cutting (sic) us (ie, the defendant) out".

I then made the order which has been reproduced at the beginning of this judgment as I was of the view that this was a proper instance for the court to exercise its powers under O. 34 r. 7 to make the order which I did against the defendant as the defaulting party as such an order, in my view, would meet the ends of justice, taking into consideration the total disregard the solicitors for the defendant had displayed to the repeated letters from the solicitors for the plaintiff for the parties to move towards compliance with the court's directions of 1 March 2001.

The court was not unaware that such an order would effectively shut out the defendant from ventilating its defence and counterclaim prior to judgment being entered in favour of the plaintiff and that such a step would in the normal course be considered as being against that rule of natural justice which enjoins that no final curial decision should be made in favour of one party without the other party being given an opportunity to be heard. However, to my mind, that rule of natural justice could not apply here as this was not a situation of the defendant being prevented from presenting its case. On the contrary, this was an instance where the defendant elected not to avail itself of the benefit of that rule by consciously electing to disregard the directions of the court given pursuant to the provisions of O. 34, despite constant reminders for the defendant to cooperate with the plaintiff to comply with those directions.

Order 34, rr. 3(1) and 3(2) specify the powers that the court may exercise when parties do not appear on the return date stated in the notice in Form 63 or 64 set out in Appendix A requiring the parties to the action to attend before the judge in chambers. Pursuant to r. 3(1) "the judge may in his absolute discretion make any order as meets the ends of justice, including striking out the action or any defence or counterclaim, or other pleading or entering judgment against the defendant ...". Similarly, as O. 34 r. 7 also empowers the judge to make such order against the defaulting party as meets the ends of justice, it cannot be gainsaid that the power to be exercised pursuant thereto must include a power to order that the defence and counterclaim herein be dismissed and that judgment be entered for the plaintiff as per the statement of claim against the defendant, and I accordingly so ordered. To my mind, the rules committee in its wisdom in empowering the court so to act could not have intended those powers to remain in the procedural law as a dead letter, never to be invoked even in the most appropriate of circumstances and put in the Rules for mere embellishment.